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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of April 20, 1959 denying the petition for writ of certiorari, and that a writ of certiorari issue to review a judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the petition filed March 4, 1959 herein.

STATEMENT

The principle question presented in the petition for certiorari in this case was whether the failure of the trial court to order production, even for purposes of an *in camera* inspection by the court, of the exhibits originally included and submitted to the Government as a part of a Government witness' report of examination violated the requirements of the *Jencks* Act, 18 U.S.C.

§ 3500, and the decision in *Jencks* v. *United States*, 353 U.S. 657, and constituted a denial of due process.

The Government witness was the special agent in charge of the investigation of Petitioner and the chief prosecution witness at the trial. His report of examination consisted of a letter of transmittal to which were attached certain exhibits. During the course of his direct testimony the witness testified to the material contained in the letter of transmittal and in the exhibits.

Upon Petitioner's demand, the trial court directed production of the report at the conclusion of the witness' direct testimony. When this report was examined by defense counsel, it became apparent that the Government had produced only the letter of transmittal but had removed therefrom all the exhibits originally attached thereto. Defense counsel then requested the court to direct the production of the removed exhibits, but the court—without even an *in camera* inspection of these exhibits—refused to do so.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. It was Petitioner's contention that the letter of transmittal and the exhibits together constituted "a written statement" made by the Government witness "and signed or otherwise adopted or approved by him" under sub-section (e)(1) of 18 U.S.C. § 3500; and in any event, constituted material to which Petitioner was entitled under this Court's decision in *Jencks* v. *United States, supra.*

Since the denial of the petition for certiorari in this case, oral argument was had in Nos. 435, 436, 437, 451,

and 471, all involving questions as to what constitutes a statement within the meaning of the *Jencks* Act and/or the *Jencks* decision. The argument in those cases reflected considerable concern on the part of the Court as to the scope and compass of the *Jencks* Act with respect to documentary materials other than or in addition to verbatim statements.

While the questions presented in those cases were closely related to the question presented in the instant case, it seems apparent from the arguments and briefs that the issue presented here will not necessarily be disposed of by the decisions in those cases. It is respectfully urged, therefore, that this Court consider specifically the question presented in this case so that this important aspect of the *Jencks* rule will be clearly delineated.

2. It was also Petitioner's contention that when a report of examination submitted by a Government witness is shown to relate to the witness' direct testimony, the *Jencks* Act requires that the trial court order production of the report in its entirety, at least for an *in camera* inspection by the court. This contention was predicated on the belief that under the *Jencks* Act, production for an *in camera* inspection is mandatory, and that the Act leaves no discretion in the trial court insofar as production for inspection by the court is concerned. Stated differently, once a report, or any part thereof, has been shown to relate to the direct testimony of a Government witness, the trial court *must* order its production. Only after the report has been produced, may the trial court exercise its discretion to remove material contained in the report. And only after the balance of the report has been submitted to the defense for its examination and use

may the trial court again exercise its discretion as to whether the documents or material contained therein are admissible, in the event that the defense seeks to offer them in evidence.

It has been the consistent position of Petitioner that it is important to distinguish between production for inspection *in camera* by the trial court, production for inspection by the defense, and admissibility into evidence. Demands for production by the trial court for an *in camera* inspection, demands for inspection by the defense, and offers in evidence, raise related issues, but independent ones. *Gordon v. United States*, 344 U.S. 414, 418. And this is especially true under the *Jencks* Act.

Government counsel, during argument in Nos. 435-437, appropriately conceded these distinctions, agreeing that there was a difference between documents which were admissible and documents which must be produced. "Form governs production, but context governs admissibility." 27 U.S.L.W. 3307, 3308 (May 5, 1959).

If the *Jencks* Act is to have any force and effect in preserving the rights of a defendant, it must be carefully applied. Material cannot be removed or excised from a report unless there has first been a careful inspection by the trial court. Yet the courts below—in denying this protection to Petitioner—have in substance held that a trial court may in its discretion permit material to be withheld by the prosecution without first examining it *in camera*, even though it relates to the direct testimony of the witness.

In the majority of cases construing the *Jencks* Act, the courts have been careful to indicate that the procedure established by the statute must be

followed with meticulous care, see e.g. *Scales* v. *United States* (C.A. 4, 1958) 260 F. 2d 21, 44; *Sells* v. *United States* (C.A. 10, 1959) 262 F. 2d 815, 823; *United States* v. *De Lucia* (C.A. 7, 1959) 262 F. 2d 610, 614; see also *United States* v. *Spangelet* (C.A. 2, 1958) 258 F. 2d 338, 341. Indeed, the fact that the *Jencks* Act requires an *in camera* inspection by the court, has been the primary reason given by the courts of appeals for sustaining the constitutionality of the Act.

> "Most significant is the fact that the new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the reports should be excised is not left to the Government but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. The standard set by Jencks, 353 U.S. at page 669, 77 S. Ct. at page 1014, that justice requires no less than that the defense be entitled to see the reports to determine what use may be made of them is satisfied; and justice requires no more." *Scales* v. *United States*, *supra*, 260 F. 2d at 43-44. See also *Sells* v. *United States*, *supra*, 262 F. 2d at 823; *United States* v. *De Lucia*, *supra*, 262 F. 2d at 614.

Furthermore, a careful examination of the legislative history of the *Jencks* Act indicates that the most significant factor in favor of passing the legislation was that a defendant would not be denied access to any information which could be helpful to his case.

By submitting the report of examination for *in camera* inspection by the trial court and thereafter permitting the trial court to excise certain material which may be relevant, the defendant's right to access would be kept open. See Senate Report No. 981, 85th Cong., 1st Sess. (1957).

The decisions of the courts below reflect a serious difference in interpretation as to the mandatory requirement of the *Jencks* Act for the production of reports of witnesses for *in camera* inspections.

3. Since the filing of the petition in this case, a decision has been reported in which the identical question presented in the petition for certiorari has been determined.

In *United States* v. *Franklin* (N.D. Ohio) 170 F. Supp. 503, which was a prosecution for violation of the cabaret tax provisions of the Internal Revenue Code (Title 26, U.S.C. § 1700 (e) I.R.C. of 1939, Title 26 U.S.C. § 4231 (6) I.R.C. of 1954), the defendant sought production of the reports of two special agents who testified at the trial. The reports were produced, but the exhibits attached to them were not. Without an *in camera* inspection of the exhibits, the court held in *Franklin*, as it did in this case, that the Government was not required to produce the exhibits. 170 F. Supp. at 505-506.

The decision in the *Franklin* case, following so closely after the decision in the instant case, indicates that the problem of whether exhibits may be removed from the statement of a Government witness prior to production, and without an *in camera* inspection by the trial court, is one which will arise with increasing frequency. Federal courts engaged in the trial of

criminal tax cases require a definitive interpretation at this time as to whether an agent's report with exhibits removed is sufficient production to satisfy the requirements of the *Jencks* rule. To let years go by and to await a cluster of cases going off in different directions is to encourage rather than dispel the confusion which this problem is now plainly engendering.

The question of whether the exhibits to an agent's report must be produced along with the report for the trial court's *in camera* inspection is, as pointed out in our petition, important to the general administration of criminal justice in the federal courts, and is of particular importance in the trial of criminal tax cases. It is standard procedure for the special agent in charge of a criminal tax investigation to make a report at the conclusion of his investigation. It is also standard procedure to attach as exhibits to this report the results of the agent's investigation. And, most important, the special agent in charge of an investigation invariably testifies as a Government witness at the trial.

We also pointed out in the petition that if the decisions of the courts below—holding that these exhibits need not be produced for an *in camera* inspection—represent a sound construction of the *Jencks* rule, it becomes a simple matter for the Government to establish a policy which could completely frustrate the purpose of the Act and the decision which gave rise to the Act. The Government need only provide that an agent's report be brief and perfunctory with the main substance relegated to exhibits. In this way, critical portions of an agent's report may be removed from the reach of a defendant.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58.2 of the Rules of this Court.

Counsel for Petitioner